STATE OF MICHIGAN

IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff/Appellant, and Cross-Appellee,

v.

AUTO OWNERS INSURANCE COMPANY, a Michigan corporation,

Defendant/Appellee, and Cross-Appellant.

_____/

Supreme Court Docket No. 122601

Court of Appeals Docket No. 233826

Lower Court No. 92-2882-NF
Hon. Charles D. Corwin

122601

DEFENDANT-APPELLEE AUTO-OWNER INSURANCE COMPANY'S ANSWER TO PLAINTIFF-APPELLANT'S MOTION TO FILE SUPPLEMENTAL BRIEF

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Dated: January 6, 2003

INTRODUCTION

The Motion filed by Plaintiff/Appellant seeking leave to file a supplemental brief is based on documents that are not part of the record of this appeal which the Court is now asked to consider, and repeatedly accuses Defendant/Appellee of making "blatant misrepresentations" where no such misrepresentations are made. In fact, the only way that Plaintiff can create the impression of "misrepresentations" is by mischaracterizing the arguments made by Defendant, and then seeking to discredit these invented "misrepresentations" that were never made. Defendant therefore requests that the Motion be denied.

In the alternative, if Plaintiff is allowed to file his Supplemental Brief, Defendant requests that the Court also accept this Answer from Defendant in response to that Supplemental Brief. Otherwise, Defendant is unfairly prejudiced by Plaintiff being permitted to file a brief arguing a number of new points not made in its original Application without any opportunity for response.

ARGUMENT

I. PLAINTIFF'S ARGUMENT MISREPRESENTS DEFENDANT'S POSITION WITH REGARD TO THE PRESERVATION OF THE DETRIMENTAL RELIANCE ISSUE.

Plaintiff begins his argument by stating that Defendant "blatantly misrepresented" facts to the Court because Defendant allegedly accused Plaintiff of failing to preserve the detrimental reliance argument for appellate review. (Plaintiff's Motion, p. 6, Supplemental Brief, p. 6.) Defendant made no such misrepresentation in its pleadings. Defendant argued that plaintiff's request to the Court of Appeals that the case be remanded to the trial court to determine if there was detrimental reliance was not raised in the trial court. Defendant also noted in a footnote that Plaintiff argued that the disposition of the funds should be decided by the bankruptcy court, not

that the circuit court or bankruptcy court should decide the issue of detrimental reliance. (Defendant's Response to Plaintiff's Application for Leave to Appeal ("Response Brief"), p. 16.) Defendant never stated in its pleadings that Plaintiff had not opposed Defendant's motion in the trial court (in fact such opposition is noted at page 6 of Defendant's Response Brief), or that Plaintiff did not argue he had paid the money in reliance on the Court's order.

Defendant agrees that Plaintiff opposed Defendant's Motion for Relief from Judgment by arguing that the judgment had been partially paid and that monies were distributed to the bankruptcy court and service providers. Plaintiff did not, however, seek any type of evidentiary hearing from the Court to determine the issue of detrimental reliance. That was Defendant's only point with respect to this one paragraph in its Response Brief, and that point is fully supported by the record.[1]

II. THE PREJUDGMENT INTEREST ISSUE WAS PROPERLY RAISED AND DISPUTED BY DEFENDANT AT THE TRIAL COURT LEVEL.

Plaintiff argues that Defendant has misrepresented to the Court the issue of whether prejudgment interest was disputed at the trial court level. In support of his argument that the prejudgment interest award was not contested, Plaintiff attaches correspondence between Plaintiff's counsel and Defendant's prior counsel regarding the calculation of prejudgment interest on the award of benefits. (Plaintiff's Supplemental Brief, Exhibit C.) None of these documents are part of the record of this appeal, and could not properly be considered by the Court in the event leave is granted. Appeals are to be decided based on the record before the

[1] The Court should not lose sight of the fact that as things currently stand, Defendant has been ordered to pay no-fault penalty interest to Plaintiff in an amount that exceeds the amount of prejudgment interest previously paid to Plaintiff. Therefore, unless the Court grants Defendant's Cross-Application for Leave to Appeal and reverses, Plaintiff will not be required to recoup any funds, but Defendant can simply take a set-off against additional funds due to Plaintiff.

Court. MCR 7.311. Thus, documents outside the record should not be considered in the Application process either.

Even if the documents are considered, however, they are irrelevant. As Defendant stated in its Response Brief, the original trial court order entitled a "judgment" was entered by that court on September 27, 2000 (Dkt. #195) and included an award of prejudgment interest from the time when the Complaint was filed through September 1, 2000. Of the total amount awarded by that order, $216,519.68 was attributable to prejudgment interest. Defendant's Response Brief also stated that this amount had been paid, together with the no-fault benefits claimed to be owing. (Defendant's Response Brief, pp. 5-6.) After the payment was made, on December 29, 2000, Defendant filed a Motion for Relief from Judgment on Prejudgment Interest Entered on September 27, 2000 Pursuant to MCR 2.612(A) and (C). (Dkt. #205.) In its Motion, defendant argued that it had mistakenly paid prejudgment interest on the portion of the interest attributable to the time when the case was on appeal (approximately four years). The trial court denied the Motion, but found that Defendant timely filed the motion, a finding not appealed by Plaintiff. (Dkt# 216; Dkt. #214, p. 216.) All of these facts concerning the proceedings before the trial court are clearly set forth in Defendant's Response Brief (*see* pages 5-6, 17.) Therefore, Defendant has never attempted to "hide" or "mislead" the Court into believing that a portion of the prejudgment interest was not paid by Defendant. Defendant agrees that it paid a portion of the prejudgment interest to Plaintiff, but also notes (as Plaintiff's Supplemental Brief fails to do), that Defendant also filed a motion for relief from judgment for the award of that prejudgment interest, thereby preserving the issue for review.

Furthermore, Plaintiff's Supplemental Brief certainly attempts to lead this Court to believe that all of the prejudgment interest covered by the Court of Appeals' opinion was paid by

Defendant. This impression is completely untrue. While Defendant paid the amount set forth in the September 27, 2000 order, it did not pay any of the prejudgment interest accruing on the trial court's award of no-fault penalty interest pursuant to MCL 500.3142, an amount exceeding $260,229.62. Plaintiff's argument regarding "detrimental reliance" has no applicability to the award of prejudgment interest on no-fault penalty interest, as this amount was never paid by Defendant to Plaintiff, and therefore never paid by Plaintiff to the bankruptcy court or his creditors.

III. THE AMENDMENT TO MCL 600.6013(5) APPLIES TO THIS CASE BECAUSE NO FINAL NONAPPEALABLE JUDGMENT HAD BEEN ENTERED AS OF JULY 1, 2002.

Plaintiff argues that the amendment to MCL 600.6013(5) is inapplicable because the prejudgment interest covered by the September 27, 2000 "judgment" was paid by Defendant and therefore the final judgment entered on March 26, 2001 became "final" and "nonappealable" prior to the effective date of MCL 600.6013(5). Plaintiff argues that the judgment was nonappealable because (1) it was the equivalent of a consent judgment and (2) that Defendant paid it and thereby waived its appellate rights. There are several fundamental flaws in these arguments.

First, Defendant never stipulated to the September 27, 2000 order or the March 26, 2001 judgment as a "consent judgment" as suggested by Plaintiff. Indeed, as reflected on the documents themselves (Plaintiff's Supplemental Brief, Exhibit D and Exhibit 1 hereto), Defendant approved these orders "as to form." Defendant never consented to the judgment itself or the substance of the order. It stipulated only to the form of the order, thereby preserving its right to contest the judgment.[2]

[2] Plaintiff cites two cases involving consent judgments, which it claims stand for the proposition that consent judgments are reviewed for abuse of discretion. *Hadfield v. Oakland*

Second, if Defendant had paid the judgment in full and never sought to set it aside, then it might be argued that Defendant had forever lost its right to appeal the portion of the prejudgment interest covered by the September 27, 2000 order. In the "waiver" cases cited by Plaintiff, the parties had voluntary paid a judgment and did not contest it until after the appeal was filed. *See Industrial Lease-Back Corp v Township of Romulus*, 23 Mich App 449; 178 NW2d 819 (1970)(township waived its right of appeal when it issued permits before filing a claim of appeal); *Becker v Halliday*, 218 Mich App 576; 554 NW2d 67 (1996)(plaintiff not permitted to appeal after providing a satisfaction of judgment to the defendant); *Bartel v New Haven Township*, 323 NW2d 806 (1982)(defendant who pays a judgment, receives a satisfaction and files it before appealing loses right to appeal); and *Dummings Enterprises v Shukert*, 231 Neb 370; 436 NW2d 199 (1989)(compliance with a writ of mandamus before appeal deprives part of appellate rights).

This scenario, however, does not describe this case. Here, after having paid the amount covered by the September 27, 2000 order, Defendant filed a motion with the trial court to set the judgment aside on the basis that it had paid prejudgment interest in error for the time period that the case was on appeal. (Dkt. #204 and 205). Although the trial court denied that motion, Defendant had every right to challenge the trial court's denial of that motion on appeal, and did so. On appeal, the Court of Appeals agreed with Defendant that prejudgment interest was not due and owing during the time that the case was on appeal and reversed the trial court with

County Drain Comm'r, 218 Mich App 351 (1996) and *Barrett v Kirtland Cmty College*, 245 Mich App 306 (2001). As is evident from the transcript attached to Plaintiff's Supplemental Brief, this is the first time Plaintiff has argued that the September 27, 2000 judgment constituted a "consent judgment." Furthermore, given that Defendant stipulated to the September 27, 2000 order only as to form and not as to substance, it cannot be construed as a consent to the substance of the terms contained therein. If Plaintiff's position on this issue was adopted as the law of Michigan, no parties will ever again approve an order as to form only on the fear that a Court will not honor such a stipulation and will instead interpret it as a stipulation approving the form and substance of the order.

respect to that issue. Although Plaintiff argued to the Court of Appeals that the judgment should not be set aside, the Court of Appeals did not accept that argument, and neither should this Court. The bottom line, however, is that Defendant properly preserved its right to challenge the portion of the award of prejudgment interest it had already paid by filing its motion for relief from judgment, unlike the facts presented in the cases cited by Plaintiff. Thus, the issue was not waived and the March 26, 2001 judgment did not become final and nonappealable as a result of the payment on the September 27, 2000 order.

Third, and critically important, is that the order that the Court of Appeals determined to be "final" was the judgment entered on March 26, 2001.[3] Defendant has not paid the no-fault penalty interest awarded by that judgment, or the prejudgment interest awarded on top of the no-fault penalty interest (approximately $260,299.62). That judgment was subject to appeal even under Plaintiff's new theory, as it has never been paid. The amended statute states that it applies to all cases where there is a "final, nonappealable judgment" entered as of July 2, 2002. The judgment at issue in this appeal is the March 26, 2001 judgment, and it was appealable – even with respect to the prejudgment interest – as of July 2, 2002. Thus, the new statute applies.

Finally, Plaintiff argues that by "stipulating" to the calculation of interest, Defendant lost its right to appeal. Once again, this argument was not raised to the Court of Appeals. Moreover, all of the orders regarding the calculation of interest were approved as to form only. In the unpublished decision cited by Plaintiff, *Housing Products Co v Flint Housing Comm*, docket No. 233605, decided November 15, 2002, the issue before the Court appears to have been the proper date on which the prefiling interest began to accrue. The Court of Appeals recited that the

[3] As noted by Defendant in its original Response Brief, it filed a Claim of Appeal from the September 27, 2000 order, but the Court of Appeals determined that it was not a final judgment and remanded the case back to the trial court for entry of a "final" judgment.

parties had stipulated to the calculations and the date on which they should begin, and had thereby waived their right to challenge the date when interest began to accrue. Defendant here made no such stipulation, approving the judgments only as to form, and not as to the substance of the contents of any of the orders.

CONCLUSION

The Plaintiff's request to file a Supplemental Brief should be denied. In the event that the motion is granted, Defendant requests that this Court accept the filing of this Answer in response to that Supplemental Brief.

Respectfully submitted by,

DYKEMA GOSSETT PLLC

By: 

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Dated: January 6, 2003

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

ALICE JO MORALES, as Guardian of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff,

v.

AUTO OWNERS INSURANCE COMPANY, a Michigan Corporation,

Defendant.

Case No. 92 2882-NF
Hon. Charles Corwin

Examined, entered & countersigned by me this 3-26-2001, a true copy
Clerk of Court

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REVISED JUDGMENT OF PRINCIPAL BENEFITS OWED, PREJUDGMENT INTEREST AND NO-FAULT PENALTIES

At a session of said Court held in the City of Cadillac, County of Missaukee, State of Michigan

on MARCH 23, 2001

PRESENT: HON CHARLES D. CORWIN
CIRCUIT COURT JUDGE

WHEREAS this matter was tried to a verdict by jury on February 24, 2000;

WHEREAS the jury rendered its verdict in favor of the Plaintiff and the Court having established and adjudicated that Plaintiff is entitled to, and Defendant is responsible for, no-fault personal injury protection benefits for injuries arising out of the motor vehicle accident of December 3, 1991;

WHEREAS Defendant has stipulated to the reasonableness of charges and services incurred;

WHEREAS the principal balance of benefits owed, incurred through April 30, 2000 only, together with prejudgment interest through September 1, 2000, amounts to $998,152.95;

WHEREAS the State of Michigan has made payments in the amount of $98,970.82, which are subject to reimbursement;

WHEREAS the Court having previously ordered that Plaintiff is entitled to, and Defendant is responsible for, no-fault penalty interest pursuant to MCL 500.3142 in an amount to be determined; and

WHEREAS the Court having previously ordered that Plaintiff is entitled to, and Defendant is responsible for, no-fault penalty attorney fees pursuant to MCL 500.3148 for unreasonably disputing Plaintiff's entitlement to no-fault penalty interest, in an amount to be determined;

WHEREFORE, IT IS HEREBY ORDERED that judgment is entered in favor of the Plaintiff for the principal balance of benefits together with prejudgment interest ($998,152.95), and for the amount of payments made by the State of Michigan ($98,970.82), in the total amount of $1,097,123.77;

IT IS FURTHER ORDERED THAT Defendant shall pay to Plaintiff no-fault penalty interest on the incurred charges in the amount of $278,092.69. Prejudgment interest owed pursuant to this judgment, revise to reflect no-fault penalty interest, is $260,229.62 through September , 2000, with prejudgment interest to continue to accumulate until satisfaction of judgment;

IT IS FURTHER ORDERED THAT Defendant shall pay to Plaintiff no-fault penalty attorney fees for disputing their obligation to pay no-fault penalty interest in the amount of $2,540.00;

IT IS FURTHER ORDERED THAT Plaintiff shall execute a partial or complete Satisfaction of Judgment to the extent of payments received pursuant to this Order of Judgment;

IT IS FURTHER ORDERED THAT the State of Michigan shall execute a partial or complete Satisfaction of Judgment to the extent of payments received pursuant to this Order of Judgment;

IT IS FINALLY ORDERED THAT this Judgment is a final judgment disposing of all the claims and adjudicating all the rights and liabilities of all the parties.

Honorable Charles D. Corwin
Circuit Court Judge

Approved as to Form:

WAYNE J. MILLER P31112
Attorney for Plaintiff

DANIEL J. BEBBLE (P51257)
Attorney for Defendant

per adjournment consent on 3/19/01

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STATE OF MICHIGAN
IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

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Supreme Court Docket No. 122601

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Hon. Charles D. Corwin

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

Karlene K. Schaeffer, an employee of Dykema Gossett PLLC, being first duly sworn, deposes and says that on the 6th day of January, 2003, she served a copy of DEFENDANT-APPELLEE AUTO-OWNER INSURANCE COMPANY'S ANSWER TO PLAINTIFF-APPELLANT'S MOTION TO FILE SUPPLEMENTAL BRIEF, upon

Wayne J. Miller
26711 Northwestern Hwy., Suite 200
Southfield, MI 48034

by enclosing copies of the same in an envelope properly addressed, and by depositing said envelope in the United States Mail with postage thereon having been fully prepaid.

Karlene K. Schaeffer

Subscribed and sworn before
me this 6th day of January, 2002.

Susan M. Womble, Notary Public
Clinton County, Acting in Ingham
My Commission Expires: 4/1/05

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January 6, 2003

VIA HAND-DELIVERY

Clerk of the Court
Michigan Supreme Court
925 W. Ottawa Street
Lansing, MI 48909-7522

Re: *Morales v Auto Owners Insurance Company*
Supreme Court Docket No. 122601

Dear Clerk:

Enclosed for filing are an original and 7 copies of Defendant-Appellee Auto-Owner Insurance Company's Answer to Plaintiff-Appellant's Motion to File Supplemental Brief and Proof of Service relative to the same.

Please stamp one copy and return it to the waiting courier.

If you should have any questions, please contact me immediately.

Very truly yours,

Karlene K. Schaeffer
Legal Secretary to Lori M. Silsbury

KKS1:kks

cc: Wayne J. Miller (w/encl.)